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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)	MM Docket No. 92-266
	)	
Leased Access	)	CS Docket No. 96-60

JOINT COMMENTS OF CABLE TELEVISION OPERATORS AND REQUEST FOR RECONSIDERATION

Daniels Communications, Inc.
Greater Media, Inc.
Helicon Corporation
Marcus Cable Partners, L.P.
Prime Cable
Scripps Howard Cable Company
TCA Cable TV, Inc.
Texas Cable and Telecommunications Association
Allen's TV Cable Service, Inc.
Halcyon Communications Partners
James Cable Partners, L.P.
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SUMMARY

These Joint Comments and Request for Reconsideration address several aspects of the proposed changes in the Commission's commercial leased access rules, which are inconsistent with the Communications Act and the intent of Congress. The proposed maximum rate formula is unreasonably low and does not adequately compensate the cable operator because it fails to include important real costs incurred by the operator when existing cable programming is replaced with leased access programming Furthermore, the assumptions relied on by the Commission in creating the proposed rate formula are erroneous. The Commission incorrectly attributed low leased access demand solely to lease channel rates, without considering other significant reasons for the limited use of leased access channels.

The proposed maximum rate formula would result in an unconstitutional taking of the cable operator's property without just compensation in violation of the Fifth Amendment. In addition, the proposed rules contravene rights and protections afforded under the First Amendment, as well as, exceed the Commission's powers as limited by the Communications Act.

Cable operators should not be required to place leased access programming on basic or the CPS tier. Congress provided no such mandate and such a requirement will have a serious adverse impact on cable operators and their subscribers. Furthermore, the proposed cost formula should not be applied to part-time rates for leased access as the price for part-time carriage is already inadequate. We are also very concerned about other critical issues in this proceeding which are addressed below.

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JOINT COMMENTS OF CABLE TELEVISION OPERATORS AND REQUEST FOR RECONSIDERATION

These Joint Comments and Request for Reconsideration are submitted on behalf of the following large and small cable television operators and associations: Daniels Communications, Inc.; Greater Media, Inc.; Helicon Corporation; Marcus Cable Partners, L.P.; Prime Cable; Scripps Howard Cable Company; TCA Cable TV, Inc.; Texas Cable and Telecommunications Association; Allen's TV Cable Service, Inc.; Halcyon Communications Parnters; James Cable Partners, L.P.; and Moffat Communications Limited. These "Joint Commenters" include MSOs, as well as small cable operators and state cable associations, all of whom strongly oppose the proposed changes in the commercial leased access rules. In addition, the Joint Commenters request reconsideration of several aspects of the rule changes adopted by the Commission in this proceeding in its *Order on Reconsideration*, FCC 96-122, adopted March 21, 1996.

Introduction and Background

The 1984 Cable Act[1] created a statutory requirement and framework for implementation of commercial leased access. One primary purpose for adopting the provision was to remove cable operators' editorial discretion over a limited number of channels.[2] The 1992 Cable Act amended Section 612 by, inter alia, broadening the scope of congressional purpose to include "the promotion of competition in the delivery of diverse sources of video programming."[3]

While Congress sought to facilitate access to cable systems by unaffiliated programmers, and to promote competition through leased access, it intended those objectives to be pursued in a manner that protected the economic interests of cable companies and the growth and development of the industry. Thus, the purposes of Section 612 provide for "assur[ing] the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with **growth and development** of cable systems."[4]

Significantly, Congress explained precisely what it intended in assuring the continued growth and development of cable in the context of leased access. The legislative history of the 1984 Cable Act, which was not affected by the 1992 amendments, makes it

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1 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 *et seq.*

2 House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) at 50.

3 Communications Act, § 612(a), 47 U.S.C. § 532(a).

4 *Id.* (emphasis added).

absolutely clear that Congress intended all operator costs, potential revenue losses and a reasonable profit be recovered in leased access rates:

> The Committee also wishes to stress that in establishing a reasonable price pursuant to this section, a cable operator is not limited to simply recovering costs and **potential** losses of revenues diverted from other services. Nothing in these provisions is in any way intended to deprive a cable operator from receiving **a fair profit** from the use of this designated capacity.[5]

By establishing rates on this basis, Congress recognized that leased access rates should reflect how leased access programming would "affect the marketing and mix of existing services being offered by the cable operator to subscribers, as well as the potential market fragmentation that might be created and any resulting impact that might have on subscriber or advertising revenues."[6]

As explained in these Comments, the proposed rate formula is irreconcilable with the very principles that Congress directed must be considered in setting leased access rates. While the Commission gives lip service to the need for cable operators to recover "opportunity costs" arising from leased access, it proceeds to eliminate from consideration the most critical of such costs (loss of subscribers and diminished growth subscriber growth). The concept of a "fair profit" is simply not factored in at all.

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[5] *Supra* n.2 at 52 (emphasis added).

[6] *Id.* at 51.

The reality today is that, since the leased access requirements were originally conceived by Congress, cable operators (and programmers) have been meeting the goals that were originally expressed -- the delivery of a wide variety of diverse programming sources and promotion of competition among those programmers. Market forces have succeeded beyond anyone's expectations in establishing a plethora of highly diverse program providers, independent of leased access. Moreover, the 1992 Cable Act's limitations on cable carriage from vertically integrated providers guarantees that a significant number of these voices will be unaffiliated with the owners of cable systems.

To the extent that the Commission believes that "relatively little leased access capacity is being used by unaffiliated programmers,"[7] its assumption that the current highest implicit fee formula is at fault and should be drastically changed is incorrect. The Commission's purported cure (slashing leased access rates essentially to nothing) does nothing to address the true problems with implementing leased access and will undoubtedly result in substantial damaging side effects to the cable industry.

In this regard, the Commission must recognize that, in adopting its initial leased access rules, it acknowledged that the rules were a "starting point" that would require further refinement both through the rule making process and as the Commission addressed issues on a case-by-case basis.[8] To date the Commission has issued a number of decisions clarifying certain aspects of its leased access rules, and now in the *Report and Order* has

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[7] *NPRM* at ¶ 6.

[8] *Report and Order and Further Notice of Proposed Rule Making* in MM Docket No. 92-266, 8 FCC Rcd. 5631 at ¶ 491 (1993).

adopted additional rule changes that address issues underlying the vast majority of leased access complaints. Most of the difficulties in implementation of leased access to date have arisen from confusion in FCC rules that were admittedly just a "starting point". The Joint Commenters believe that the drastic proposals urged by the Commission are simply unwarranted and that the newly clarified rules should be given an opportunity to work.

The Joint Commenters strongly urge the Commission to reject the proposed "cost-based maximum rate" which completely fails to adequately compensate cable operators. Nothing in either the 1984 or the 1992 Cable Acts authorizes the Commission to promote increased use of leased access through unreasonable low and confiscatory channel lease rates. The proposed policy is not only contrary to the statutory scheme, it is unnecessary, contrary to the public interest, and constitutionally suspect.

The Commission should not take any action at this time until the newly clarified rules are given an opportunity to work. Although the Joint Commenters believe that the highest implicit fee rate is insufficient to fairly compensate cable operators, it is preferable to providing an even greater subsidy to leased access users, particularly where the growth and development of the industry is at stake. Finally, at a minimum, if the Commission lowers leased access rates there must be a reasonable transition period (e.g. four years) to facilitate introduction of those new rates and to minimize disruption to subscribers as valued existing services are dropped to make way for leased access programming. The Commission seems to recognize such a transition period is necessary for these reasons as well as to accommodate existing programming contracts. In addition, the transition will allow for the completion of rebuilds over the next several years with the additional channel capacity to better accommodate the lease of channels.

I. The Commission's Conclusion That Low Demand For Leased Access Channels Is Presumptively Due To High Costs Is Erroneous Because It Ignores Other Significant Reasons For The Lack Of Use

The Commission begins with a premise that the level of demand for leased access is too low. This initial assumption ignores the market realities that exist in the cable industry today. Since the adoption of leased access in the 1984 Cable Act, cable operators have added substantial amounts of diverse programming thereby filling a multitude of distinct programming niches. The type of programming that was originally thought could only be provided by leased access users is now commonplace. It logically follows that demand for additional programming of this type would naturally decrease.

In addition, much of the leased access programming is unattractive to viewers; therefore, the programmer is unable to recoup sufficient revenue from subscribers to cover the costs involved. Production costs for attractive, quality programming are extremely high and the cost of channel carriage is but one factor in the equation. It is not the primary reason for insufficient revenue to the programmer. The predominant problem is lack of viewer demand for leased access programming. Consumers simply do not watch or support it in sufficient numbers. Furthermore, there is only a limited national market for leased access programming because of a wide variation in the capacity and ownership of cable systems. This decentralization increases distribution and marketing costs for the leased access programmers.

Finally, uncertainty surrounding the Commission's original rules has made it difficult for leased access programmers to establish business plans and obtain financing for programming.

These are but a few of the reasons why more leased access channels have not been fully utilized. The Commission has failed to consider or account for any of these additional factors. In addition, there is no evidence that the current "highest implicit fee" formula sets carriage prices too high, thus stifling demand for leased access. Even the Commission's conclusion that demand is "too low" is not based on an evaluation of all of the various factors which limit development of leased access. Although the Commission has authority to set reasonable rates as it did with the highest implicit fee, it is not authorized to make a policy determination as to what amount of access programming is sufficient. We agree, however, with the Commission's conclusion that "as long as the maximum leased access rate is reasonable, minimal use of leased access channels would not indicate that the rate should be lowered."[9]

II. The Proposed Maximum Rate Formula Is Unrealistic And Does Not Adequately Compensate The Cable Operator

Section 612 of the Communications Act specifically mandates that the Commission establish leased access rules so that "<u>the price, terms, and conditions of such use . . . are at least sufficient to assure that such use will not adversely affect the operation,</u>

[9] *Id.* at ¶ 24 (citing 130 Cong. Rec. H10441 (daily ed. Oct. 1, 1984) (colloquy in House proceedings); 130 Cong. Rec. S142888 (daily ed. Oct. 11, 1984) (reference to colloquy in House proceedings)).

financial condition, or market development of the cable system."[10] The Commission's proposed maximum rate will lead to a number of adverse consequences for cable systems and their subscribers. This is particularly true in today's competitive environment where DBS, wireless cable and other cable competitors are not subject to commercial leased access or other regulatory requirements, such as must carry and PEG access, which fill many cable channels with programming that is unattractive to subscribers. If the Commission adopts the proposed rate changes, access requests will pour in from home shopping services, infomercial companies and other undesirable programming providers that, if carried, will drive away substantial numbers of cable subscribers and limit cable's future growth.

A. Zero Compensation

The Commission intends the proposed rate formula to be based on the lost "opportunity costs" incurred by the cable operator as a result of replacing an existing programming service with a leased access user. However, the Commission eliminates from the formula the most substantial opportunity costs imposed by leased access by suggesting that compensation be limited to items such as lost advertising revenues or sales commissions, offset by any licensing fees saved by the cable operator. The Commission rejects the inclusion of lost subscribers, diminished future growth and other very real opportunity costs.

The inherent problem with such a structure is that many programming services do not generate any advertising revenues or sales commissions; therefore, the cable operator is left with a compensation rate of zero (or even less). Also, if licensing fees are greater than

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[10] Communications Act, § 612(c)(1), 47 U.S.C. § 532(c)(1) (emphasis added).

advertising revenues and sales commissions, as they often are, the cable operator receives nothing for bumping an existing programmer for a leased access user. Ultimately, the leased access user will simply receive free carriage on the cable system. As made clear by the legislative history of the 1984 Cable Act, Congress had no intention of creating such an inequitable structure. All operator costs, potential revenue losses and a reasonable profit must be recovered under any maximum rate formula if the Act's policies are to be fulfilled.[11]

The Commission states that its purpose behind the cost formula is "not to lower rates."[12] This is difficult to believe if one considers the practical ramifications of this proposal. Some cable operators will lose between 3 and 9 channels of service to leased access users and receive little, or most likely, no compensation under the proposed formula. If the maximum rate formula proposed by the Commission is implemented, the compensation received will be blatantly unreasonable and in direct conflict with Congress' intent. Cable operators are clearly entitled under the Act to receive a fair profit from the use of its channel capacity by leased access programmers.[13]

B. Real Costs

Cable operators are primarily in the business of customer satisfaction. Their main goal is to maximize subscriber interest in order to retain and grow their subscriber base. To accomplish this formidable task, cable operators are acutely aware of the content of their

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[11] *Supra* n.2 at 52.

[12] *NPRM* at ¶ 68.

[13] *Id.*

programming and its effects on their customers. When a cable operator replaces a high-quality channel with programming of lower appeal, the operator suffers significant downgrades in service choices, lost premiums, and an erosion of its subscriber base. This seriously jeopardizes the operator's ability to finance needed rebuilds to compete in the marketplace.

This is precisely what occurs when a cable operator is required to replace an existing channel with a leased access user. Lower appeal programming is fed to subscribers and it is only a matter of time before they reject it. These are the true and unavoidable opportunity costs of leased access and the financial implications of this process must be included in the cost basis of the rate in order to adequately compensate the cable operator. Thus, lost opportunity costs must include the loss in penetration and growth due to less attractive programming. The only way to avoid subscriber losses would be if like programming were substituted by the leased access programmer, but past experience with leased access confirms that this will not be the case. With the Commission's proposed cost-based formula, the cable operator bears the entire risk of declining future revenues and growth due to leased access programming. Congress recognized that potential market fragmentation may result from leased access users and that the impact on subscriber revenues that follows must be accounted for in any rate formula.[14] Therefore, these risks need to be shared if the statutory policy and the public interest are to be justly served.

The Commission has suggested that because the major costs resulting from reduced subscriber penetration and growth are difficult to quantify, they should not be

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[14] *Supra* n.2 at 51.

included in the rate formula. However, the above scenarios are the practical reality of leased access and the formula must compensate for these very real costs. Furthermore, the actual value is only calculable over the long run as cable operators work to achieve their goal of maximizing subscriber interest. The Commission cannot forget that subscriber satisfaction, penetration and growth must be the cable operators' primary economic objectives, particularly if they are to rebuild cable systems and compete with telephone companies, DBS and other video delivery systems.

C. The Commission's New Double Compensation Theory Is Invalid

The Commission's conclusion that the "highest implicit fee" formula allows double recovery by the cable operator is invalid and not based on any reasonable evidence. The "highest implicit fee" was originally designed by the Commission itself to recover only the value of the channel and nothing more. The Commission's false impression that now this fee also produces double compensation is based upon a misconception of the true service cable operators provide to their subscribers. The Commission's theory assumes that, even with the onslaught of leased access programming replacing existing desired programming within the same tier, subscriber revenues will remain unchanged. This, however, will not be the case. Subscribers are keenly aware of the quality of the programming being offered. When they see the quality decrease, the actual and perceived value of their cable service as a whole decreases. Because of the development of alternative video delivery systems such as DBS and wireless cable offering exactly the programming and packages customers want, customers will drop their cable subscriptions and the cable operator's revenue stream will be reduced significantly.

Even if the Commission's double payment theory were correct, it merely provides that cable operators will receive additional revenues. Why is it that these monies should then go to the leased access programmers through a subsidized rate? Should not cable operators be entitled to the fruits of their labor in increasing the value of their systems over years of development efforts?

D. "No Subsidy"

The Commission states, "[w]e do not believe that Congress intended that cable operators subsidize programmers who seek access to their system through the provisions of Section 612."[15] While we agree with the Commission's statement of congressional intent, its proposed cost-based formula clearly creates such a subsidy. "Commercial" leased access users are supposed to enter into "business" arrangements with cable operators and negotiate contracts "in a manner consistent with growth and development of cable systems."[16] Furthermore, "commercial" leased access users, unlike public access users, must be required to adequately compensate cable operators.

The proposed cost-based formula will result in dramatically lower fees; thus, subsidizing certain low-value, low-interest programmers by giving them a free ride to an established base of cable viewers. Even worse, this subsidy, paid for by the subscribers, is

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[15] *NPRM* at ¶ 27. *See also* House Report, *supra* n.2 at 52.

[16] *NPRM* at ¶ 25 (citing Communications Act, § 612(a), 47 U.S.C. § 532(a); a purpose of the 1984 Cable Act retained in the amended version).

being handed out to support programming that has very limited appeal to consumers. If the Commission truly intends to carry out congressional intent, the proposed formula must be revised so that there is no subsidy and leased access programmers pay the full cost of the cable channels they use.

III. The Commission's Other Goals For Section 612 Will Not Be Achieved With The Proposed Maximum Rate Formula

The Commission states that its goal is to "promote competition and diversity of programming sources on the one hand, as well as to further the growth and development of cable systems on the other."[17] The Commission also recognizes the need for an appropriate balance between these two interests.[18] Natural market forces have gone a long way to strike that balance independent of any leased access requirements. Giving away cable channels at bargain-basement prices will only create a more severe imbalance against the cable industry.

Due to the diverse programming choices that exist today, the number of unserved niches has substantially diminished. Therefore, it has become increasingly difficult to develop new and original access programming that interests a significant number of subscribers. Based on its own experience in this proceeding and in the leased access complaint process, the Commission must recognize that most leased access programming takes the form of home shopping and infomercial services because they are the most economically feasible for the programmer. By decreasing the maximum rate so drastically, an explosion of shopping channels, infomercials and 900 number services will emerge and will

[17] *NPRM* at ¶ 25.

[18] *Id.* at ¶ 26.

replace some of the more interesting and truly diverse programming available on cable today. There are numerous examples of cable systems where commercial leased access has replaced all or some portion of valuable existing programming like C-SPAN and C-SPAN II. There simply is not sufficient channel capacity on most cable systems today to accommodate subsidized rates and artificial growth of commercial leased access channels. Furthermore, new programming networks that are currently in the development process will also be detrimentally affected. Such a result is entirely inconsistent with both Congress' and the Commission's own stated policy objectives of increasing diversity and furthering development of cable.

In addition, the Commission must recognize that the video services industry is currently in a state of transition. Competition is surfacing on every front and cable operators face a rigorous task in maintaining their place in the market. Decisions regarding programming are critical if cable operators are to compete with DBS, telephone companies, SMATV, wireless cable and other new providers of video services. Most of these providers do not have similar access requirements, leaving them with greater editorial and business discretion to maximize subscriber interest by providing a very appealing, undiluted product to consumers. This is a most inappropriate time to disarm cable operators in their fight to compete in the marketplace.

IV. The Proposed Commercial Leased Access Rules Would Result In An Unconstitutional Taking Of Property Without Just Compensation In Violation Of The Fifth Amendment

Cable television distribution is a private enterprise entitled to the full protections provided under the Fifth Amendment to the Constitution. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Regulations which require all, or even a portion of, a cable operator's channel capacity to be transferred to another's use, (or which devalue the cable system's basic or CPS tier) constitute a taking of property under the Fifth Amendment. In order to be a constitutional taking, just compensation must be provided.[19] Not just any compensation, however, will be deemed "just;" therefore, the critical issue here for Fifth Amendment purposes is whether the Commission's maximum rate formula properly considers the true value of the asset being confiscated.

In determining just compensation, the Commission's formula must account for more than the channel space being given up to the leased access user. The proposed cost-based formula fails to include anything more. By limiting the lost opportunity cost, the Commission's formula encompasses only a small portion of the operator's actual costs. Thus, this rate cannot be deemed just compensation. "The [cable operator] is entitled to have consideration given to all of the capabilities of the property . . . and to any and every use to which it may reasonably be adopted."[20] Just compensation must reflect that a business is

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[19] U.S. Const., V Amend. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) (holding that "Fifth Amendment does not prohibit 'takings,' only uncompensated ones"); *Olson v. United States*, 292 U.S. 246 (1934).

[20] J. Sackman, *Nichols' The Law of Eminent Domain*, 12.02 (1993).

being conducted.[21] This includes an operator's ability to use individual channels for tiering, packaging, or providing a la carte services. In the past, the Commission has attached value to channel capacity as evidenced by the Commission's proposed cost of service rules regarding rebuilds and upgrades. While future profits generally are not included in just compensation, "an assessment of the property's capacity to produce future income . . . " must be accounted for in the valuation formula.[22]

Leased access programmers, as "commercial" users, should be required to compensate the operator based on such an assessment. The value of the existing programming and the future effects of dropping it are factors that must go into the equation if just compensation is to be paid. Moreover, the maximum rate must take into consideration "[t]he highest and most profitable use for which the property is adaptable . . ."[23] In other words, when a valuable program service is displaced with a significantly lower appeal leased access channel, the compensation paid must account for the losses that follow in order for the taking to be constitutional under the Fifth Amendment

The Commission's proposed formula does not fulfill these constitutional requirements. It completely ignores the value of both existing and future relationships between cable operators and their subscribers and understates the nature of the cable

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[21] *See, e.g., United States v. Hardage*, 58 F.3d 569 (10th Cir. 1995)(noting "concern" with valuation system that fails to consider business as going concern and remanding case to district court); *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987)(finding in context of temporary regulatory taking, that "loss takes the form of an injury to the property's potential for producing income").

[22] *Yancey v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990).

[23] *Olson, supra* n.19 at 255; *United States v. Land, 62.50 Acres*, 953 F.2d 886 (5th Cir. 1992).

operator's primary business objective -- maximizing subscriber interest and satisfaction. Failure to revise the proposed valuation formula so that cable operators are adequately and justly compensated for leased channels would constitute a violation of the Fifth Amendment.

V. The Proposed Regulations Contravene Rights And Protections Afforded Under The First Amendment And Exceed The Agency's Powers As Limited By The Communications Act

"Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc. v. F.C.C.*, 114 S. Ct. 2445, 2456 (1994). Whatever may be the "physical characteristics" of cable distribution of speech, "they do not require the alteration of settled principles of our First Amendment jurisprudence". *Id.* at 2457.[24]

In addition to those protections specially afforded under the Constitution, the Communications Act itself expressly provides that the cable media must not be subjected by any governmental entity to regulation as a "utility" or "common carrier." 47 U.S.C. § 541(c). Yet, the underlying theme of the proposed commercial leased access regulations is to convert a substantial portion of cable operators' privately owned, limited distribution capacity to the use of third parties pursuant to a scheme that can only be characterized as the paradigm of "utility" or "common carrier" regulation. The effect, and indeed ultimate purpose, of the

[24] Were similar or analogous "access" regulations to be proposed for the "print" or "broadcast" media, they would be facially unconstitutional. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1979); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). Yet, the Commission apparently assumes that "settled principles of . . . First Amendment jurisprudence do not pertain to the cable media. *Cf. Turner, supra.*

regulation is to usurp a cable editor's control over the selection and arrangement of communications distributed via its privately owned and operated facilities and to compel that publisher/editor to distribute the unwanted and, in some cases, publicly undesirable programming fare of others to the editor's subscribers, a clientele carefully cultivated and nurtured over a prolonged period of time. The end result is not only to devalue the worth of the private publication and to totally discount the costs and ingenuity of developing the business, but also to countermand the cable publisher's free exercise of journalistic judgment, an intrusion found by the *Turner* Court to be constitutionally impermissible *per se*. *Turner*, 114 S. Ct. at 2463 (FCC "has no authority and, in fact, is barred by the First Amendment and [47 U.S.C. § 326] from interfering with the free exercise of journalistic judgment").[25] As such the proposed rules constitute an uncompensated "taking" under the Fifth Amendment, an unconstitutional intrusion hopelessly at odds with the First Amendment and a violation of the agency's own enabling legislation.

Despite those restraints so clearly placed by the Constitution and the Communications Act on the Commission's authority, the proposed rules are the creative device of agency discretion without the benefit of legislative guidance or administrative justification.[26] Without legislative mandate and demonstrated justification, the suggested rules

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[25] It is crucial to note here that the *Turner* Court found "that Congress' overriding objective in enacting must-carry was . . . to preserve access to free television for those without cable". *Turner*, 114 S. Ct. at 2461. That "overriding objective" does not translate to a justification for commercial leased access. Thus, *Turner* is in no way a precedent for the intrusion of commercial leased access.

[26] *Compare Turner*, 114 S. Ct. at 2470-72, and that mass of data accumulated by the Congress purportedly to justify its must-carry provisions, ***with*** the complete dearth of similar findings or data relative to commercial leased access regulation of the cable television media. It is as if the FCC were unaware of the constitutional and statutory implications created when specially devised burdens and other content-related restraints are selectively imposed upon the press or on the conduct of fully

fall of their own weight. *Motor Vehicle Manufacturing Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50 (1983).

VI. Other Issues In Notice Of Proposed Rulemaking

A. Tier And Channel Placement

The most critical issue in this proceeding, with the exception of the proposed rate changes, relates to tier and channel placement. As the Commission noted in the NPRM, Congress did <u>not</u> mandate the specific tier or channel location for leased access, as it did for PEG channels.[27] The Commission cites the legislative history of the 1992 amendments to Section 612 as requiring leased access to provide a "genuine outlet" on channel locations that "most subscribers actually use."[28] In spite of the statutory provision that leased access use should not adversely affect the market development of cable systems, the Commission nevertheless used the legislative history as the basis for its tentative conclusion that access programmers have the right to be carried on basic or the CPS tier with the highest subscriber penetration.

Such a requirement will have a serious adverse impact on cable operators. Cable operators generally do not sell individual channels except as premium services because the most effective marketing strategy has proven to be offering packages of programming with attractive or established channels combined with newer, less well known services. These

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protected communicative activity.

[27] *NPRM* at ¶ 116.

[28] *NPRM* at ¶ 118 (citing 1992 Senate Report at 79).

packages are carefully assembled by the cable operator and carefully scrutinized by subscribers. The value of such a package would be substantially diminished by the introduction of an infomercial channel, more home shopping, 900 number services and similar leased access programming, particularly if it displaces an existing service on basic or the CPS tier. The cable operator has carefully built its basic and tier penetration over the years at substantial expense. There is no logical or legal reason to give new leased access programmers a free ride in these programming packages. Certainly, any such requirement would have to include a significantly higher fee from access programmers to compensate cable operators for lost value of their services and lost subscribers.

Leased access channels should be offered to all cable subscribers on a per-channel basis as a premium service. This provides access to 100% of the cable subscribers and the subscriber has the right to decide if it wants to actually receive and pay for the leased access programming. Such an approach is all that is required to meet the objectives of the statute and will encourage the development of quality leased access services.

B. Part-Time Rates

The Commission acknowledges that a majority of cable operators have found that even the highest implicit fee formula results in inadequate compensation for part-time leases.[29] It is unnecessary and inappropriate for the Commission to require cable operators to reduce part-time rates even more by applying the proposed cost formula. Furthermore, given the Commission's decision to permit the sale of leased access time in 30-minute increments,

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[29] *NPRM* at ¶ 42.

the valuation method for part-time rates is exceedingly more important. An influx of infomercial providers will take advantage of this situation, 30-minute increments coupled with low part-time access rates, and place their product on leased access channels in order to avoid paying the cable operator's (or local broadcaster's) normal rate for commercial time.

Finally, the Commission should delete the restriction that part-time rates for a given 24-hour time period must total no more than the maximum rate that could be charged for a full-time channel for one day. There are operational and other costs associated with part-time leasing that must be recouped and the cable operator should have the flexibility needed to do so.

C. Preferential Access

The Commission should not establish special rate categories for non-profit programmers. As the Commission noted in adopting its original leased access rules, Section 611 of the Communications Act regarding public, educational and government (PEG) access, adequately provides for non-profit programming, thus precluding the need for any additional set-aside for such programming.[30] It was not Congress' goal to force cable operators to subsidize numerous underfunded programmers.

D. Obligation To Open New Channels And Bump Existing Cable Services

Cable operators should not be required to remove any existing cable service to provide leased access at a subsidized and non-compensatory rate that does not consider all of

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[30] *Rate Order*, 8 FCC Rcd. at 5954, ¶ 526.